



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wheeler Brothers, Inc.

File: B-223263.2

Date: November 18, 1986

DIGEST

1. Performance standards for operation of an automotive parts store are not considered overly restrictive where the procuring agency has presented prima facie support that the restrictions are necessary to meet the agency's legitimate minimum needs and the protester has failed to show that the requirements are clearly unreasonable.

2. Solicitation provision for contract payment deductions for failure to meet required delivery schedule does not impose an impermissible penalty where the protester has not shown that there is no possible relationship between the provision and reasonable contemplated losses.

DECISION

Wheeler Brothers, Inc. (Wheeler) protests various performance standards established under request for proposals (RFP) No. F08651-86-R-0059, issued by the Department of the Air Force for the operation of a contractor-operated automotive parts store on Eglin Air Force Base. Wheeler contends that the RFP's performance requirements are overly restrictive because certain types of replacement parts cannot be obtained within the specified time limits and that penalty provisions are arbitrary and capricious because they will not produce the desired results where parts are simply not available.

We deny the protest.

The RFP contemplates award of a 12-month requirements contract. Performance under the contract will include ordering, stocking and delivering parts for vehicles in the Eglin fleet, which includes a wide variety of cars, trucks, buses and special purpose vehicles. The contractor will also operate the parts store, performing such tasks as assisting customers and processing orders.

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As we understand the protest, Wheeler is complaining that a number of the manufacturers' price lists that offerors are required to submit under the RFP are for lines of special purpose vehicle parts the protester calls "oddball" parts (such as steamroller or street sweeper parts), and that it is either commercially infeasible to stock such parts due to the low incidence of demand, or impossible to acquire them quickly by special ordering. Since all price-listed parts fall within the delivery requirements under the contract, and Wheeler believes the delivery requirements are too stringent when applied to these "oddball" parts, Wheeler urges that contractors should neither be required to supply price lists for these parts nor to deliver them according to the delivery schedule imposed by the contract. Wheeler also alleges that a provision for contract payment deductions for failure to meet the established delivery schedule imposes an impermissible penalty.

The RFP requires the contractor to deliver 65 percent of all price-listed parts ordered, except working stock replenishment parts, upon demand each month. Delivery of the remaining parts (the 35 percent not provided upon demand) is to be provided as follows: If the required part is "VDP" ("vehicle deadlined for parts," indicating that the vehicle is rendered inoperative due to a lack of parts or accessories), the part must be provided within 4 days after request, unless a later date is agreed upon by the agency's Quality Assurance Evaluator and the contractor; if it is a "deferred part" (which does not affect the safety or operation of the vehicle), or a working stock replenishment part, it must be provided within 30 days after request unless otherwise agreed.

Failure to meet the delivery schedule for the parts not provided on demand (i.e., the remaining 35 percent of all parts) will result in a deduction from the contract price in the amount of \$5 per item per day of delay.

Wheeler contends that the mandatory price listing provisions in combination with the delivery and penalty provisions are unreasonable and, in effect, counterproductive. The protester notes that some vehicles in the Eglin fleet are from the 1950's and argues that some parts can no longer be ordered from stock but have to be specially built. Wheeler maintains that most "oddball" parts are not readily accessible except through the manufacturer and that the delivery time for these parts is in any case extremely slow. In this situation, Wheeler argues, the contractor either has to pay an exorbitant price to maintain a large stock of parts or has

to pay penalties for failure to meet the delivery schedule. Either way, Wheeler contends the cost to the government is increased, without necessarily solving the problem of delivering parts without any delays.

Wheeler suggests that this problem could easily be resolved by either not making price listing mandatory (and instead creating an incentive for bidders to offer more price lists by making it one of the bases for evaluating offers) or by removing the oddball lines of parts from the mandatory price list schedule.

In response, the Air Force explains that mandatory price-listing is intended to avoid the unbalanced bidding that can result when offerors are free to select which price lists to supply. In addition, the Air Force reports that, when offerors all provide the same price lists, offers can be evaluated on a uniform basis. The agency also notes that, contrary to Wheeler's assertion, not all manufacturers' price lists are mandatory under the RFP; eleven manufacturers in the special-purpose category have already been removed from the agency's initial list. The current RFP requires only six more price lists for special purpose parts than are required under the current contract, and the agency points out that this addition represents only 2 percent of the total of all price-listed parts. In addition, the delivery requirement has been relaxed--from 70 percent, under the current contract, to 65 percent under the RFP--in recognition of the expanded price-list requirement and the possible impact this might have on delivery.

The agency also states that the Vehicle Maintenance Officer (VMO) for the Eqlin fleet is charged with managing the fleet so that no more than 10 percent of all vehicles will be out of commission at any time; under this standard, a maximum of 3 percent of the fleet may be deadlined for parts (VDP) and 7 percent deadlined for maintenance (VDM). According to the VMO's and contracting officer's analysis of prior usage records, a delivery on demand requirement of 65 percent of price-listed parts is the absolute minimum requirement that will prevent the fleet from exceeding the 3 percent VDP limit. In this connection, the agency notes that Wheeler, as the incumbent contractor, met the 70-percent delivery requirement until the last few months of the current contract, and then only failed to meet the required rate "by very small percentages." Although the report does not disclose Wheeler's exact level of performance, it states that the contractor "consistently exceeded 65 percent timely delivery" during the pendency of the current contract.

Government procurement officials are generally in the best position to know the government's actual needs and, therefore, are best able to draft appropriate specifications. Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 CPD ¶ 179. While agencies should formulate their needs so as to maximize competition, requirements which may limit competition are not unreasonable, so long as they reflect the government's legitimate minimum needs. Duroyd Manufacturing Co., B-213046, Dec. 27, 1983, 84-1 CPD ¶ 28. Because the adoption of any specification or requirement necessarily limits competition to some extent, the question is not whether competition has been restricted, but whether it has been unduly restricted. Hydro-Dredge Corp., B-215873, Feb. 4, 1985, 85-1 CPD 132.

In view of these considerations, our Office will not question agencies' decisions concerning the best methods for accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD ¶ 56 at 3.

Where a protester challenges a specification as unduly restrictive of competition, the burden is first on the procuring activity to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. Once the agency establishes this support, the burden shifts to the protester to show that the requirements objected to are clearly unreasonable. Rack Engineering Co., B-208615, Mar. 10, 1983, 83-1 CPD ¶ 242.

We cannot conclude from the record that the Air Force's specifications are arbitrary or otherwise unreasonable. The agency states that the need for mandatory price lists was determined by examining the model year, manufacturer and model type for each vehicle in the fleet, and tailoring the mandatory price lists to assure adequate parts coverage for the different vehicles in the fleet. The Air Force reports that the requirement is also intended to prevent the unbalanced bidding that may occur if offerors are allowed to decide which price lists to supply and to provide a common basis for evaluating bids.

In our view, the Air Force has presented prima facie support for its position that the specifications are not unduly restrictive. While the protester argues that there are other methods of guarding against unbalanced bidding, it does not show that the agency's chosen method is unreasonable. Furthermore, regarding Wheeler's challenge to the delivery schedule, we also believe the Air Force's arguments provide

prima facie support for these provisions. The agency cites a legitimate interest in ensuring that the timely delivery of parts will adequately support the efficient operation of the fleet. The agency has based its determination of its minimum needs (and the best method of accommodating those needs) on an analysis of its past usage of these supplies and services. The agency notes that its records indicate that when delivery on demand percentages decrease, the number of vehicles dead-lined for parts increases proportionately. By surveying prior usage records, agency officials have determined that delivery on demand of 65 percent of all price-listed parts is the minimum requirement that will prevent Eqlin from consistently having more than three percent of its vehicles dead-lined for parts, which may in turn cause a total of more than 10 percent of the fleet not to be usable. According to the agency, this proportion of disabled vehicles would adversely affect the fleet's mission. We have recognized that delivery requirements such as these may be reasonable where the reduction of excessive downtime of vehicles is critical to the agency's needs. See Dynateria, Inc., B-222773, Aug. 5, 1986, 86-2 C.P.D. ¶ 157. Furthermore, we can fully appreciate the Air Force's legitimate interest in having a uniform basis for comparing proposals and find it to be a reasonable basis for requiring price lists for necessary manufacturer's parts.

Although Wheeler argues that meeting the delivery standards could be difficult in some circumstances, Wheeler has not shown that the requirements do not reasonably reflect the Air Force's minimum needs or that compliance with them is so onerous that performance under the contract would be impossible. Indeed, the record indicates that contractors (including Wheeler, as the incumbent) have been able to meet the 65 percent delivery on demand requirement in the past. The agency also points out that certain practices of some contractors, such as ordering parts through the contractor's out-of-state home office rather than through local sources, contribute to unnecessary delays. It is this type of preventable delay that the Air Force seeks to avoid by imposing these price-listing and delivery on demand requirements.

In these circumstances, we find that the price-listing and delivery requirements are necessary to support the Air Force's minimum needs and that the protester has failed to show that the requirements are clearly unreasonable. This portion of the protest is therefore denied.

Wheeler also protests a provision in the RFP's Performance Requirements Summary that allows the Air Force to deduct \$5 per day from the contract price for each item that is not

delivered within 4 days if it is a VDP part or 30 days if it is either a deferred or working stock part. Wheeler contends that the RFP's system for assessing damages for late performance through contract payment deductions establishes a penalty that bears no reasonable relationship to the actual damages or harm that might be suffered by the government in the event of delayed delivery and thus constitutes an improper liquidated damages provision under Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 12.2 (1985). Wheeler contends that the \$5 charge is assessed without any regard to the price of the part, the reasons for the delay, or the government's actual damages that result from not having the part. The protester argues that, for example, the part might cost \$10 and the government might not be damaged at all, yet the contractor could be charged several hundred dollars because the part is back-ordered at the manufacturer. Wheeler argues that the payment deductions penalize the contractor for industry practices and market conditions that are beyond the contractor's control and that they restrict competition because they are exorbitantly high. In this regard, the protester argues, the deduction provision creates an unreasonably high risk for the contractor.

Initially, we agree that the damages provision imposes what amounts to liquidated damages for late delivery. Liquidated damages are fixed amounts which one party to a contract can recover from the other upon proof of violation of the contract without proof of actual damages sustained. Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194. Before we will rule that a liquidated damages provision imposes an impermissible penalty, the protester must show that there is no possible relationship between the solicitation's specified liquidated damages rate and reasonable contemplated losses. International Business Investments, Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668 at 10.

The Air Force argues that it is impossible to assess actual damages; while damages caused by a delay in the delivery of one type of part may be nominal (for example, where other vehicles are available to replace the deadlined vehicle), damages in other cases may be substantial (for example, where a vital, special-purpose vehicle must be replaced through commercial rental or overtime use of other similar vehicles). The agency also points out that having an excessive number of deadlined vehicles can result in overuse and breakdown of remaining vehicles, overtime pay for personnel used to accomplish tasks with fewer vehicles available, and commercial rental of replacement vehicles; each of these possibilities represents additional costs to the agency. The agency report also cites administrative costs, such as telephoning the

contractor's supplier to determine delivery status and perhaps initiate other action when the contractor has failed to follow up on deliveries or to locate alternate sources of supply. Regarding the argument that the \$5 charge is imposed as a flat rate no matter what the value of the part to be delivered, the Air Force points out that even a very low-priced part can render a vehicle inoperative, and thus the price of the part would not accurately represent the cost of the delay to the agency.

In response to the protester's allegation that the provision penalizes the contractor for circumstances beyond his control, the agency points out that the contractor may have to take aggressive follow-up action where parts are not available through the most routine channels and that the deduction provision is intended to compensate the government when the contractor fails to meet this responsibility. On the other hand, the agency maintains, the Quality Assurance Evaluator (QAE) can extend delivery dates where circumstances warrant an extension. In connection with this protest, the contracting officer has advised offerors that under the RFP it is intended "that a later date may be agreed upon by the QAE and the contractor upon notification from the manufacturer/suppliers that the manufacturer/suppliers cannot meet the required delivery date." Although Wheeler points out that the clarifying language only acknowledges the agency's discretion and does not require the agency to extend the delivery date, the Air Force has indicated that proof of impossibility of timely delivery is a valid defense and no deduction would be enforced in these circumstances. The agency report also states that "if [parts] must be ordered from the manufacturer and the manufacturer cannot deliver for 60 days, the 60 days would be agreed as the delivery date and no deductions would be made."

Regarding Wheeler's contention that the deduction provision imposes an unconscionable level of risk on the contractor, we have held that the mere presence of risk in a solicitation does not make the solicitation inappropriate. Talley Support Services, Inc., B-209232, June 27, 1983, 83-2 CPD ¶ 22. It is within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the contractor and minimum administrative burdens on the agency. See American Transparents Plastic Corp., B-210898, Nov. 8, 1983, 83-2 CPD ¶ 539 at 6. Moreover, the provision that Wheeler is protesting affects all potential bidders equally, and, in our view, the fact that bidders may respond

differently in calculating their prices is a matter of business judgment that does not preclude a fair competition. See Talley Support Services, Inc., B-209232, supra, 83-2 CPD ¶ 22 at 5.

Again, our review in this area is limited to determining whether the agency's determination of its needs, and the best way to accommodate them, is clearly unreasonable. See Hydro-Dredge Corp., B-215873, supra. In view of the Air Force's arguments, we do not believe the protester has clearly demonstrated this to be the case nor do we believe the protester has demonstrated that the \$5 per day liquidated damages provision is excessive or totally unrelated to the actual damages which may result from late delivery of vehicle parts. See International Business Investments, Inc., B-213723, supra.

The protest is denied.

fa *Seamus E. Van Cleve*
Harry R. Van Cleve
General Counsel